ΔΙΓΑΜΙ'ΑΣ ΑΔΙΚΙ'Α:

OR,

The first Marriage

OF

Katherine Fitzgerald.

(Now Lady *Decies*)

Contracted *in Facie Eccleſiæ* with JOHN POWER, now Lord of *Decies*, Aſſerted,

BY

DUDLY LOFTUS, D. LL. and Judge of the Prerogative Court in *Ireland*.

If a Damſel that is betrothed to an Husband, and a Man find her in the City, and lie with her: then ye ſhall bring them both out unto the Gate of that City, and ye ſhall ſtone them with ſtones, that they die. Deut. 22. 23.

LONDON,
Printed in the Year, MDCLXXVII.

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JOHN POWER, now Lord of
Decies, Asserted,

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If a Damsel that is betrothed to an Husband, and a Man find her in the City, and lie with her: then ye shall bring them both out unto the Gate of that City, and ye shall stone them with stones, that they die. Deut. 22. 23.

LONDON,
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To the Right Honourable

ARTHUR

Earl of Angleſey, Lord Keeper of His Majeſties Privy-Seal, &c.

May it pleaſe your Lordſhip,

I *Here preſent to your Lordſhips View and Patronage the enſuing Argument of Dr.* Loftus *on the Caſe of the Lord of* Decies; *which, though it be ſuccinct, yet it is ſo perfect a Dilucidation of Truth, as may ſerve to enlighten all well-diſpoſed Underſtandings to the perception of what Determination the Law gives therein; ſo that I may juſtly ſay of him, as* Aulus Gellius *ſaid of* Saluſt, Exquiſitiſſimus eſt brevitatis Artifex, *he being as rich in matter, as frugal of words. And though Arguments of this nature may ſometimes ſeem rather to kindle an angry flame, than to quench the fire, by reaſon either of unfaith-*

fulneſs of ſtating the Caſe, or of petulency of ſpeech in handling the Matter; yet I am exempt from ſuch fear in the publiſhing this modeſt and ſober Treatiſe, by reaſon the ſtating of the Caſe as here ſet down, is acknowledged to be true by both Parties to the Controverſy; and for that there is not ſo much as a word of offence given in the ſtyle of the Author, nor any looſe intemperancy of ſpeech us'd therein, he ſpeaking nothing elſe but what falls directly under the conſideration of the Subject, as fit to be determined by the preciſe deciſion of Law.

Nor do I deſign to preſent this, as a matter of Curioſity to the Reader, though the matter of Fact be de rarò contingentibus; *nor to preſent unto the Lady Objects of Terror, to frighten her with guilty Apprehenſions, or to tax her with the polluted myſtery of a Matrimonial-Bed, or the ſtain of Unchaſte Extravaganeies; or to convene her before the great Judge of Heaven and Earth, who is ſo formidable to the ſence of Guilt; or to upbraid her with the inevitable Conſequences of her Ruine, which will enſue her Temerity without Repentance: but to ſatisfie all Parties concerned, and even the whole World, in the Juſtice and Reaſon of the Lord* Decies *his Caſe, ſufficient to enforce the belief thereof unreſiſtible, even upon the moſt prevaricated Underſtandings. For your Lordſhip will not find in the Author's diſcourſe an umbrage of Rhetorical Flouriſhes, but a breviary of ſuch Arguments and Authorities as are of force to ſway the points in controverſie, and to turn the Objections out of all Laws into*

to

to *Arguments to perswade the contrary; insomuch, that the said Doctor's Allegations are so luculent, that words of Authors could not, by Invention it self have been put in order, more for our advantage; nor could Imagination frame a Conception of words more to the proof and approbation of our Cause, than are the said* Doctor's *most authentick Allegations, being Authorities too clear to be denied or eluded, leaving no place to contrary Exposition, and giving countenance with Reason to whatsoever he proposes to be believed.*

Furthermore, he clears the Text from the disparagement of vain Cavils, the misinterpretations of impertinent Glosses, and confutes the Lord Cooke, *not only by the incompetency of his Authority, being neither Judge of, nor vers'd in Matrimonial Causes, but also by the inevitable Deductions from his mistaken Positions.*

And finally, the said Doctor *lays down such Principles, to beat out a path to the decision of the Cause in behalf of the Lord of* Decies, *as that Judgment cannot be given in favour of Mr.* Villiers *without a manifest decadency from ancient practice, and deviation from all known Rules of Justice (as is generally conceived) whereby it is hoped that the Lady upon consideration and reflection on the many Prejudices of her Seduction hitherto, and the Conviction of this Argument will be reduced to the modest acknowledgment of her fault; which is my earnest desire, who upon many Obligations am bound not only to wish her happiness, (as I do*

from

from the bottom of my heart) but by my beſt Endeavours to argue the ſincerity of my real Reſpects to her, from whence the Publication hereof chiefly proceeds, and to remain in the profeſſion I now make to continue during my Life,

Your Lordſhips moſt humble,

faithful, and devoted

Servant,

R. P.

JOHN

JOHN Lord *DECIES* of the Age of eight Years, was married by the Arch-Biſhop of *Canterbury* to *Katherine Fitz-Gerald*, (with the conſent of her then Guardian) having compleated twelve years and a half of her Age; She about one and twenty months after the ſaid Marriage, diſagreed to the ſame, and on *Eaſter*-Eve laſt took to her pretended Husband *Edward Villiers*, Eſq; the ſaid Lord *Decies* being yet alive, notwithſtanding the Inhibitions of the Court of *Arches*.

QUÆRE.

Whether ſhe could avoid the firſt Marriage with the ſaid Lord Decies, *or make Reclamation thereof?*

ANSWER.

I Conceive the Law to be ſo clear in the Caſe above ſtated, that there cannot ariſe any conſiderable difficulty among the Learned in reſolving the *Quære* therupon propounded; Yet that the Reſolution thereof may be the clearer, and the more ſatisfactory to the underſtanding of all thoſe who are or may be concerned in the ſame, I ſhall bring it under the determination of a more general Queſtion, ſtated with ſuch Diſtinctions, Limitations, and Specifications, as will not only explicitly reſolve the ſame, but alſo anſwer and prevent ſuch Objections as may ariſe out of ſome confuſed Notions and Allegations that may be produced againſt the Negative Reſolution of the ſaid *Quære*.

The Queſtion therefore is thus generally propounded, *Whether and when thoſe who contract Marriage, may depart therefrom by Reclamation?*

Whereunto I anſwer; That either ſuch Contract hath already paſſed into a Marriage, or *in vim Matrimonii de præſenti*; either by preſent Conſent, or by Carnal Knowledge ſubſequent: in which caſe there is no departure therefrom by way of Reclamation.

Or ſuch Contract hath not as yet paſſed *in vim Matrimonii de præſenti*, and then firſt both Parties are at

at age of Conſent, to wit, the Man hath attained the age of fourteen years; or, ſecondly, both of them are under thoſe reſpective ages; or, thirdly, the one of them hath attained that age and not the other.

In the firſt Caſe of this tripartite Subdiſtinction, where both Parties are at age of Conſent, the one Party cannot lawfully depart from the Contract without the conſent of both.

In the ſecond Caſe of the ſaid Diſtinction, to wit, both being under Age at the time of the Contract; it is to be underſtood whether both, or one only of them will reclaim before either of them attain to the competent age of Marriage: And I conceive they cannot, whether they be equally diſtant from the ſaid competent Age; (as for example, He is Twelve years old, and ſhe Ten; or unequally diſtant, he being Thirteen and ſhe Ten:) or whether both, or either of them will reclaim after the arrival of both at competent Age as aforeſaid; And at this time arriving together at competent Age they may reclaim, as when at the time of the Contract of Marriage they were both equally diſtant from the Age competent at a different time, when one arrived at the Age before the other, having been unequally diſtant from a competent Age of plenary Conſent at the time of the Contract: or both, or either of them reclaims ſome time after the Accompliſhment of years competent for Marriage, and then they cannot, whether both

of them arrive thereunto at the ſame time, or at divers times; as when the Man was Thirteen years of age, and the Woman Ten, the Man being by the revolution of a Year arrived at that competent Age aforeſaid, who then may reclaim, or thank himſelf for the loſs of that benefit; So that when they are of different ages from the time of plenary Conſent, it is in the pleaſure of the Party who firſt comes to Age, to diſſolve the Contract by Reclamation, which if he ſhall not then do, this Power is devolv'd to that Party who ſhall be then under Age.

As to the third Caſe of the Diſtinction, where one of them hath attained the age of plenary Conſent at the time of the Contract, and not the other; the Party that hath ſo attained that age at the time of the Contract may not reclaim; but the Party who was then under that age, and now hath attained it, may make Reclamation. So when one of Age contracts with one under Age, the Contract is immediately good as to both, and each of them bound to expect until the younger comes of Age, who if he then make Reclamation, the Contract of Marriage is diſſolved; but if he ſhall not reclaim, they ſhall be compelled by the Church to proſecute the Contract.

I having thus ſet down the firſt Principles which relate to the Controverſie, and are of greateſt importance to the determination thereof, I ſhall now apply

apply my ſelf more particularly to the very Caſe, and in the firſt place alledge out of the Decretals *de Diſpon. Impub. Cap. de illis* §. *Mulier autem*, where it is ſaid, *Mulier autem quæ poſtquam annos Nubiles attingit, ei qui nondum ad annos aptos Matrimonio venerat, nupſit, cum in eum ſemel conſenſerit, amplius non poterit diſſentire, niſi ipſe cui nupſit, in eam ſuum negaverit præſtare conſenſum.* And though the Gloſs may ſeem to derogate from the Text, ſeeming like the Gloſs of *Orleans*, which, as hath been ſaid, corrupts the Text; yet I conceive that the Gloſs upon the words, *ſemel conſenſerit*, having ſet forth *quod multi contractus claudicant, & ex una parte poſſunt tenere, & ex altera non*; and adding afterwards a diverſity by the word, *Secus* there ſubjoyned, where he ſaith, *Secus in Matrimonio, quia illud vinculum non poteſt conſtare niſi ex duobus conſenſibus*, doth not prejudice the Lord of *Decies* his Caſe: for he was at the time of the Marriage capable of giving a Conſent, being then of above Seven years of age, which he cannot recal until he come to the age of Fourteen, and will continue; unleſs he then, or immediately after diſclaim the ſame; whence *Dominus Abbas* ſaith, *Si alter pubes, & alter impubes, & impubes reclamat, non auditur ante ætatem Legitimam, ſi autem pubes reclamat, non auditur, ex quo ſemel conſenſit, & ſic diffiniunt hi* §. *quicquid dicat Gloſſa*, either derogating from the Authority of the Gloſs, or putting ſuch reaſonable Senſe thereon, as may reconcile it to the Text,

by

by his *diffiuunt, quicquid dicat Gloſſa*, which is as much as to ſay, This Gloſs doth not hinder, but that Judgment may be given, notwithſtanding the ſame, to reject the Reclamation of the party who was at age at the time of the Contract. And as for the words of the Reaſon given by the Gloſs, *quia illud vinculum non poteſt conſtare niſi ex duobus conſenſibus*, I conceive that the word *Conſtare* bears the ſenſe of the word *Conſiſtere*, as it doth in *Pandects*, *L.* 68. *&* *L.* 98. *in fi. de Solut.* So that the ſenſe of the whole clauſe is, That ſuch Marriage cannot conſiſt or continue, without the conſent of the *Minor* be continued when he comes of age.

And as to the Authority of the Gloſs, it hath always been held in great veneration, in ſo much that it hath been called *Juris Idolum*. *Sallicetus* ſaid, that we ought, *adhærere Authoritati Gloſſæ, ſicut Bononienſes Carotio, & ſicut ducens navem inhæret temoni*; Nay further, *Anthonius Curſetus* ſaith, *de Authoritate Gloſſæ, illam omnibus Doctoribus antecellere*; yet in limitation of his words, and explication of what honour hath been attributed to the Gloſs by the former Quotations, he ſubjoyneth theſe words, *Scilicet Gloſſæ Authoritatem antecellere, hoc eſt, ſingulis partitivè, non ſimul ſumptis.*

Moreover, I confeſs that in the *deciſiones Parliamenti Delphin. quæſt.* 39. ſet forth by *Guido Papæ*, termed *Excellentiſſimus Juris utriuſq; Monarcha*, it is ſaid, *Opinio Gloſſæ magnæ eſt Authoritatis*; but it is, as there ſet forth,

Ubi

Ubi corroborata eſt communi Doctorum Opinione; for the Gloſs never prevails againſt the common Opinion, or the expreſs Determination of the Text, though *in cauſæ arbitralis definitione*, the Opinion of the Gloſs is allowed, as it was in a Judgment in a Court of Parliament of the Dolphinat 1453, and in the year 1456, in a Cauſe there depending between *Claudius Conſtanus* and one *Boccagius*: whence it is, that *Johannes Calvinus* the Civilian, *alias Kahel Wateranus ad vocabulum*; *Gloſſa*, ſaith, *quotidie, & in Scholis, & in Judiciis, Gloſſas impugnari refelliquè videmus, niſi enim vel jure, vel rationibus funditùs nitatur, & à textu non diſſideat, minimè ſequenda*; *nam ubi Textus expreſſi ſunt, ibi nulla eſt dubitatio, nec ad Gloſſam reſpiciendum*: But that the *Cap. de illis*, is expreſs, plain, and clear, being written from *Alexander* the third to the Biſhop of *Bath*, will be hereafter proved by the Teſtimony of *Marchantius* in his Anſwer to a Queſtion upon the very like Caſe with Ours. In the mean time let it be obſerved, that the *Cap. de illis*, being written by the ſaid *Alexander*, and directed to the Biſhop of *Bath*, muſt needs be taken to be Law in *England*. *Baldus* delivers the ſame Doctrine in *L. Ancillæ*, C. de Furt. *Nam Doctrina Gloſſæ nullam nobis neceſſitatem imponit, cum ſit tantum probabilis ut dic. Bartholus. L. 1. ff. ſi certe pet.* The ſaid *Kahel* adds further, *Quod autem vulgo jactatur, quod in Judicando à Gloſſa recedi non debeat, id non eſſe verum poſt Abbatem Zaſius inculcat, cæterum ubi textibus deſtituimur, tùm Gloſ-*

ſæ:

ſæ authoritas minimè contemnenda eſt, qua de re latè differit Nevizanus *in Sylva Nuptiali.* And in this ſenſe *Jacobus Butrigarius* and *Baldus* are to be underſtood, when they ſeem to magnify the Gloſs.

And it is alſo to be conſidered, that the Gloſs is many times miſtaken as to the underſtanding of the Law; as for example, *L.* 1. *in prin. Fi. uti poſſidetis*, ſaying, that *utile interdictum* was therefore granted unto a *uſu fructuarii*, becauſe there is only conſidered a *quaſi poſſeſſioni*: for the beſt Lawyers ſay, that as a Propriety is ſeparated from a Poſſeſſion, which indeed is a part of Dominion, and therefore it was improperly ſaid by the Gloſſary, That a *uſu fructuarii* did *quaſi poſſidere*, viz. *L. permiſceri, de acq. poſſ. & Barth. in L. naturaliter in prin. Feod. & ibi*; *Jaſ. Num.* 18. Whereby it appears the remedy of that Interdict is not granted to a *uſu fructuarii* in reſpect of a *quaſi poſſeſſion*, but *inſpectâ vera poſſeſſione*, wherein the *uſus fruite* is, if there happen to be any diſturbance.

Again, *Jacobus Menochius* under the title *De Retinenda Poſſeſſione*, ſaith, that *Accurſius*, as famous a Gloſſary as *Johannes Andreas*, is guilty of a very great errour in his Interpretation of *L.* 1. *ff. Utrubi*, and of the Rubrick of the *Code*, *uti poſſ.* and that his Gloſs is to be exploded, and himſelf to be derided, foraſmuch as he declares this to be the difference between the Inſcriptions, *Uti poſſidetis, & utrubi, ſcilicet*, that *Utrubi* ſhould refer to an improper poſſeſſion of Movables,

vables, and *uti poſsidetis* to a proper Poſſeſſion; for beſides this, that it is the common Opinion, that the Poſſeſſion of Movables is a proper Poſſeſſion; it may manifeſtly be proved from the ſaid firſt Law of the *ff. Utrubi*, and the Paragraph *Retinend. inſt. de interdictis*, whilſt *Ulpian* and *Juſtinian* call it *Poſſeſſionem Mobilium*: which Appellation *in ambiguis ad ſermonis proprietatem referri debet*. Beſides, a *uſus fruct.* being *pars dominii*, it cannot be properly ſaid *uſum fructum poſsideri*. Wherefore *Menochius de Retinend. poſs. remed.* 3. *n.* 245. declareth, *Nec hic ego probo ſenſum Gloſſæ*. And the Gloſs in many inſtances is rejected by *Baldus*, *Bartholus*, *Salicetus*, *&c.* as you may ſee further in *Menochius de Retinend. poſſ. remed.* 3. *n.* 37. and in *Maſcardus ſub tit. Gloſſæ*. From whence it is that *Abaſpelqueda tit. de Pœnitentia diſt.* 6. *n.* 107. ſaith, that the Gloſs is falſe, for two Reaſons; firſt, for declaring that to be Law, *quod nullo Jure cavetur*: whence I may forcibly infer with more Reaſon, his Temerity in declaring himſelf in this point contradictory to what *Jure cavetur*, if he be to be underſtood, if the Gloſs were to be underſtood of perſons of above ſeven years of age. Secondly, for concluding againſt Cuſtom; for *Conſuetudo eſt optima Legum interpres*: *Cap. cumdilect. de Conſuetud. L. minime. ff. de Leg.* For if the Gloſs on the aforeſaid *Cap. de illis*, is to be underſtood againſt the Text, and the common Opinion, it is alſo againſt Cuſtom: for *Martinus Abaſpilqueda de pœnitentia diſt.* 6.

 n. 107.

n. 107. declares, *Non eſt Textus illius ſenſus quem Gloſſa judicat, nec obſtat Gloſſa quia Textu decepta*; ſo that it is not the Authority of the Gloſs that can decry, or bring into credit any Tenet againſt the Text, or the opinion of the Doctors. This therefore being the common Opinion in this Caſe debated, appears by the *Roſella Caſuum* fo. 404. n. 6. for theſe are the very words of the *Roſella*; *Nota ſecundum communem Doctorum Opinionem in dict. Cap. de illis de diſpenſ. impub. quod Contractis Sponſalibus inter unum puberem & aliam impuberem, impubes cum pervenerit ad pubertatem poteſt contradicere, pubes autem qui conſenſit, non poteſt ullo modo contradicere*; for which Reaſon the Propinquity ariſing *ex Matrimonio hujuſmodi rato, non conſummato*, is not reſtrained by the Council of *Trent* to the firſt degree, as is the *Juſtitia Publicæ honeſtatis*, but remains an impediment *uſq; ad quartum gradum* equally, as doth the Affinity of Marriage conſummate according to the definition of *Pius Quintus* in the Extravagant *ad Romanum*; *Contrahitur enim affinitas per Matrimonium per verba de præſenti ante copulam ratione ſocietatis Conjugalis*, as ſaith *Coſmus Piſtorienſis*, *cap.* 12 *de Impedimentis Conſanguinitatis*. And if it ſhall be objected, that the propinquity ariſing *ex Matrimonio rato*, ſeems rather to belong *ad juſtitiam publicæ honeſtatis*, for that it is not contracted *per copulam*. I anſwer, that a far greater Bond is contracted, and of a far different kind from that of *Sponſalia*; for in *Matrimonio rato*, ſuch as this is, *traditur facultas corporum*

porum ad eandem copulam, per quam Conjuges dicuntur una caro: for if Affinity be contracted by a Marriage *per verba de præsenti ante copulam*, as hath been said before; it followeth that they are made *una caro ratione societatis conjugalis ante copulam*; for it is neither the *copula*, nor the present hability *ad copulam*, that is always requisit for the continuance of Marriage; nor doth the want of such *Copula*, or of hability thereunto, set the other party at liberty. For the Exception of Impotency, which is an impediment to Marriage, requires three years experiment after Marriage before a Divorce can be sued *à vinculo Matrimonii*; for *Nuptias non Concubitus, sed Consensus facit*. And it is certain that a temporal Impotency is no diremption of Matrimony; nor doth a Disease *qui reddit hominem inhabilem multos annos ad copulam, dirimere Matrimonium. Vid. Henric. L. 12. Cap. 7. n. 1. Zanchef. L. 7. d. 104. n. 10.* And to conclude this Point, *Cosmus Philiarchus de Matrimonio, p. 302. In Matrimonio rato traditur facultas corporum ad eandem copulam, per quam etiam Conjuges dicuntur fieri una caro.* Which Doctrine is allowed by the Casuists, who say, that *Sponsalia ab uno impubere alteràque impubere Contracta, sunt partim rata, partim suspensa; Rata, quia durante ea minori ætate resilire non possunt: Non Rata autem & suspensa, quia, quamprimum impubes factus est pubes vel resilire, vel sponsalia ratificare debet, seu expressè seu tacitè, Pubes autem qui cum impubere contraxit contractui stare debet, si alter velit.* And it is also the o-

pinion of the Caſuiſts, that the Law of thoſe Countries which grant power unto a *Minor adeptâ pubertate* to make Reclamation, doth only free them *à compulſione fori externi*, and not from the obligation in *foro Conſcientiæ*; for certainly, as *Zanches* ſays, it would be a ridiculous thing in Conſcience to think, and altogether diſſonant to Reaſon to believe, that the *Sponſalia* of one under Age ſhould be valid under Age, and yet not oblige at all at the accompliſhment of years fit for conſummation of Marriage; nay, the Caſuiſts are ſo ſtrict in that caſe, that even where the *Sponſalia* are but *de futuro*, they enjoyn Penance to the Party reclamant, *de fide mentitâ*. vid. *Panormitan ad Cap. ſi inter.*

But as to *Sponſalia per verba de præſenti*, they are improperly ſo called, in reſpect of the Bond of Marriage, but in regard of the Execution of Matrimony: for *Panormitan* ſaith *ibidem*, *Uterque ſpondet in futurum reſpectu executionis, ſed reſpectu vinculi promittit de præſenti*: for which Reaſon *Divus Severus* & *Antoninus* in their Reſcripts have declared, *Neque Matrimonium qualecunque nec ſpem Matrimonii violari permittitur, & Diſpoſitio*, (loquens de Matrimonio) *verificatur in eo quod de præſenti contractu eſt, licet non ſit copula ſecuta.*

It is alſo worthy of obſervation, that the Canons which rule this Caſe are more favourable to Marriage than to the profeſſion of Religion or Teſtaments, inſomuch that at Seven years of age Matrimony may be

be valid *quoad Obligationem Matrimonii*, though the Parties who make profeſſion muſt be compleat Sixteen years of age, and the perſons who make a Teſtament muſt be Fourteen: and the Reaſon is too clear in the *Ladies Practice*, *Quia natura magis & citius inclinat ad Nuptias quam ad alios actus politicos vel prudentes*; and therefore the Law doth expreſly make irrit the profeſſion of Religion and Teſtaments made before the reſpective periods of Sixteen and Fourteen years, though in Marriage the anticipation of Seven years doth not invalidate Eſpouſals, or Marriage, *quando malitia ſupplet ætatem.* And agreeable unto this Doctrine is the Caſe ſet down in *Aurea Armilla ſub vocabulo, Sponſalia, N.* 11. Two contracted Marriage being of unequal Age, the one being Eighteen years old, the other under the Age of Marriage, were within the degrees of Conſanguinity prohibited, it was therefore unlawful for them to conſummate Marriage without a Diſpenſation: yet the elder of the two was forced to ſue out a Diſpenſation, thereby to enable him to keep the faith of his Contract, and afterwards was compelled to conſummate the Marriage; nay he was bound, ſaith *Panormitan*, *facere quid poſſit ut Diſpenſationem haberet à Superiore.*

I cannot forget to mention in *Codice Legum Wyſegothorum, Lib.* 3. *tit.* 4. *de Adulteriis*, 2. *antiq. pa.* 71. printed at *Paris*; *Si inter Sponſum et Sponſæ Parentes, aut cum ipſa forſitan muliere, quæ in ſuo conſiſtit arbitrio, ſicut*

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conſuetudo eſt, ante teſtes facto placito de futuro conjugio aut cum parentibus ejus quibus Lex poteſtatem tribuit, facta fuerit definitio & poſtea puella vel mulier Adulterium commiſiſſe detegatur, aut alteri fortaſſe viro ſe deſpondiſſe, vel in conjugio ſociaſſe probatur una cum Adultero ſive injuſto marito vel ſponſo illicito, quem ſibi contra priorem definitionem ſociare preſumpſit, in poteſtate prioris tradantur Sponſa cum rebus ſuis omnibus ſervituri, id eſt, tam mulier ipſa ſcelerata quam vir ille, qui illam Adulteraſſe vel Sponſaſſe, vel in conjugio ſibi ſociaſſe dignoſcitur; in poteſtate illius cui primum prædicta mulier pacta fuerat ſervituri tradantur, vel de his quod voluerit faciendi habeat poteſtatem. And to conclude this point of the Gloſs, there is a Cenſure thereupon, wherein are expreſſed many hundreds of Errors, with an intimation of a more accurate and fuller Repurgation thereof from many pernicious Errors: which Cenſure was publiſhed by *Thomas Manricus*, Maſter of the Apoſtolical Palace, *anno* 1575; after which (ſaith he) *multa in Gloſsis intacta reliquimus non ideo quod ut vitioſa non ſint*: whereby it is to be underſtood how little Authenticity there is in the Gloſs, eſpecially where it is againſt a clear Text, as we have proved, *Caput de illis*, to be; or *contra communem Opinionem Doctorum*, which impugn the Gloſs in this behalf.

The next Objection conſiderable ariſeth out of the *Deciſiones Rotæ*; which is indeed more in ſound of words, than can be juſtified or upheld by the Authorities alledged for ſupport thereof: for *Opinio Doctorum*

Eorum debet intelligi ſecundum jura quæ allegant, the words of the Deciſion 450 are the contrary of what is above ſet forth in the ſaid Paragraph, *Mulier autem*, and therefore emphatical enough againſt us in ſound, though not in weight of Authority: For let us examine the Allegations on which they ground their Opinion, and we ſhall find that they make nothing againſt us, and do not in the leaſt juſtifie the ſaid Doctors, unleſs they reſtrain the generality of their words according to the diſtinction I have above expreſſed of the *Minor* being above or under Seven years of age: if they ſpeak in this their Aſſertion of a *Minor* under Seven years, I ſhall not impugn their Opinion, for it is out of the Caſe of the Lord of *Decies*, he being at the time of the Marriage above the age of Seven years; but if they ſpeak of a *Minor* above Seven years, none of the Authorities which they alleadg will reach to the maintenance of their Aſſertion; for they quote but two Authorities, that is to ſay the *Caput literas*, and the *Caput acceſſit de Deſponſ. impub.* both which expreſly ſtate the Caſe of *Minors* under Seven years, and accordingly reſolve the ſame: for the *Caput literas* ſtates the Caſe of a *Minor in Cunabulis* thus; *Cum quidam eſſet perfectæ ætatis quandam puellam in cunabulis deſponſavit, procedente verò tempore, matrem puellæ cognovit, & eam in uxorem accepit.* And the Reſolution there is; *Si præfatus vir matrem puellæ, antequam Septimum annum compleſſet, in uxorem accepit, matrimonium*

Johannes Gutierres repet. §. ſui n. 112. vid. Bartholum in L. non ſolum. §. ſi liberationes verba, n. 7. ff. de liberat. legat.

nium non diſſolvas, cùm deſponſationes hujuſmodi nullæ ſunt, quæ in cunabulis fiunt. This Caſe differs in two things from ours, for the *Minor* was *in Cunabulis*, and therefore the firſt Contract was void; and though the *Minor* could not in that caſe, coming to ſeven years of age, obtain the Man by reaſon of Affinity contracted by the ſecond Marriage, yet the Mother was divorced; which ſhews that the ſecond Marriage, not only in caſe of a *Minor*, being above ſeven years of age, but after, being under ſeven years, and afterwards arriving at Seven, and then conſenting, is invalid; for which Reaſon the Man was divorced from the ſecond Wife, though not reſtored to the *Minor*, by reaſon only of the impediment of Affinity contracted: nay had the ſecond Wife been of a remoter degree to the firſt, neither Marriage could have ſubſiſted by the Law of the Church of *Rome*: not the firſt, *propter impedimentum Affinitatis*; or the ſecond, *propter impedimentum Juſtitiæ publicæ honeſtatis.* And as for the *Caput acceſſit*, it ſtates the Caſe, and reſolves it to the ſame purpoſe; So that 450 Deciſion of the *Rota Romana* can make nothing againſt the Lord of *Decies* in this Caſe, unleſs the ſaid *Rota* had power to repeal the Rule of Logick, which prohibits the Inference of a Generality from a Particular. Again, It is in the Caſe of Doctors and Judges giving their Opinion, as it is with Witneſſes rendring a Reaſon for their Depoſition, wherein there is *dictum*, and the *ratio dicti*:

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if the *Dictum* be inconcludent, and the Reaſon thereunto annexed be valid, the *Dictum* is made valid by the validity of the Reaſon; but on the contrary, the *Dictum* is not valid, if the Reaſon thereunto ſubjoyned be not concluſive; as for example: If the Witneſs ſhould depoſe thus: It is true, *Titius* did lend one hundred pounds to *Seius*, becauſe I heard it ſo reported: Upon this ground his Teſtimony would be invalid, by the failer of his Reaſon in point of Argument; and it is as eaſy to determine, that the Allegations of the *Rota*, being incompetent to prove their Aſſertion, the ſame muſt fail; for, *quod ineſt termino referenti, intelligitur ineſſe termino, ad quem eſt facta relatio.* Hence it is that *Navarrus de Deſponſ. Impub. n.* 4. ſaith *Nicholas Papa relatus à Gratiano, ex illa Clauſula integra* [*ubi non eſt conſenſus, ibi non eſt conjugium*] *ſolum infert quod pueri in cunabulis exiſtentes non poſſunt contrahere Matrimonium, & ita mens ejus fuit dicere, quod conſenſus infantilis non ſufficit, quod omnes fatentur*; and herewith agreeth the Civil Law, *L. in Sponſalibus: ff. de Sponſalibus*, where it is ſaid, That Marriage is validly contracted, *ſi perſonæ non ſunt minores ſeptem annis.*

There is one Objection more I would obviate, which is this; That *Fornicatio eſt diſſolutio Sponſalium.* To which I anſwer; That true it is that *Fornicatio*, is, *Solutio Matrimonii*, but ſuch a Solution as doth not depend upon the will of the Nocent party, but on the Conſent of the Innocent; for (ſay the Canoniſts)

Fornicatio ad Solutionem Matrimonii non pendet ex illo cujus est culpa sed ex alterius consensu.

There rests yet one Objection more which now comes into my mind, which is taken from the *cap. si inter. paragrapho, si vero inter*; grounded upon these words, *Matrimonium consummatum fortius vinculum est matrimonio rato*, (and that) *inter vincula inæqualia fortius, & si posterius vincit*: But these words being rightly understood, do not reach to our case; for that Paragraph is in case where the *Sponsalia* were *de futuro, & non per verba de præsenti*; and it is rashness from a special Case there defined, to collect this general Rule, which is severely reprobated by *Bartholus* and *Ledesma dubio* 13 *de Matrim. casu* 2. for, as we said before, *Sponsalia per verba de præsenti*, are improperly so called, *respectu vinculi matrimonii, sed respectu executionis matrimonii*: for *Panormitan ad dictum, Caput si inter*, saith, *Uterq; spondet in futurum respectu executionis sed respectu vinculi promittit de præsenti*: And though it hath been said, that the Marriage of Persons under Age are reputed as *Sponsalia de futuro*, yet this is to be understood *respectu executionis, non respectu vinculi*; so that in our Case the *Vinculum*, and the Execution may depend upon the Consent of the Lord of *Decies* when he comes to Age; but the Lady is indissolubly tied *ratione vinculi*, being above Twelve years when she was married to the Lord of *Decies*, and may be compelled to consummate the same Marriage, and the rather

rather, for that the ſecond pretended Marriage was contrary to the Inhibition of the Church, and therefore could not be ſo valid or capable of the priviledges of the firſt, according to the practice and preſident of the Court of Arches in *England*, viz. *Clarkes practice, tit.* 200. But further, both parties to the ſecond Marriage are to be puniſhed and corrected, as you may ſee in the ſaid *Clarkes practice, tit.* 199. *de puniendis perſonis ſolemniſantibus vel contrahentibus matrimonium lite pendente ac contra inhibitionem Judicis*; --And for that the *Sponſalia* celebrated between her and the Lord *Decies* could not have been diſſolved but by the Judges Eccleſiaſtical; Again, we ſay, that *quod vinculum matrimonii, matrimonium ratum & conſummatum*, are of equal force; and that ſo often as two incompaſſible bonds of equal force are contracted, the firſt prejudiceth the ſecond; and therefore it is, that *frangentes Sponſalia jubentur cogi cenſura Eccleſiaſtica ab Alexandro, 3. C. ex libris Sylvani de Sponſalibus & C. preterea: eod. tit.* That is to ſay, they who violated ſuch Eſpouſals, are commanded by *Alexander* the third by Eccleſiaſtical Cenſures to performance. And where it is ſaid, that *Matrimonium conſummatum fortius eſt vinculum*; it is to be underſtood, as we ſaid before, in the Compariſon between *Matrimonium conſummatum*, and *Sponſalia per verba de futuro.*

Having thus fully anſwered the aforeſaid Objections, I ſhall clear a miſtake of ſome upon the Statute

of *Henry* the eighth concerning Marriages: For tho in the ſaid Statute it be enacted, that the ſecond Marriage conſummate with fruit of Iſſue be to be approved of before any Marriage unconſummate, yet the ſaid Statute was repealed in the time of *Edward* the ſixth, and did not recover ſtrength by the Statute of 1. *Eliz.* in *England*, or 2. *Eliz.* in *Ireland*, ſave only as to the degrees of Conſanguinity, mentioned in the ſaid reſpective Statutes of Queen *Elizabeth*.

I am to clear alſo another miſtake of thoſe who inſiſt ſo much upon reciprocation of Contracts in matters of Marriage; as if the inequality of Conditions in a Contract could not ſtand with reciprocation thereof; as for example: *Titius* ſells his Horſe to *Seius*, and delivers the Horſe, the other receives the money; yet, if in the Contract there be a clauſe of Retrovendition, there is a reciprocation of Contract, though the Seller may have the Horſe back again by vertue of that clauſe: Even ſo, though the Law implies the condition of Reclamation, yet the Contract is good and reciprocal until ſuch Reclamation be made.

By what hath been premiſed it clearly followeth in the vigour of good Conſequence, how great a difference, and different effects there are between the puſilage of one contracting Marriage under Seven years, and the minority of one contracting above Seven years: for in the firſt Caſe, the Juſtice of publick Decency

Decency and Honeſty (as the *Canoniſts* term it) takes no place; but in the latter Caſe, there ariſeth *impedimentum publicæ honeſtatis* ſufficient for Diremption of Marriage; ſo that upon diſſolution of Marriage by diſſent at twelve or fourteen years reſpectively, the party diſſenting cannot lawfully marry by the Canon Law with the Kindred relating to the other party within the degrees prohibited. And the Reaſon is, becauſe that if he be under ſeven years he hath no conſent to bind him, but if he had compleated ſeven years, he had a conſent. And for the ſame Reaſon, if a Male under ſeven years marry with one of Age, the elder ſhall not be bound; but if the Male be above ſeven years of Age, and the Female twelve, ſhe ſhall be bound, though the Male hath his liberty to ſtand to, or depart from the Marriage: And therefore ſaith that celebrated Doctor, and famous Gloſſary, *Petrus de Anchorano* on the ſixth *Cap. ſi Infantes de deſponſ. impub. Nota quod quandoque contrahit ſponſalia Infans cum majore Infante, quo caſu, ſi non oritur ex parte Infantis, Juſtitia publicæ honeſtatis, non oritur ex altera parte, ſecus ſi Sponſalia contrahat pubes cum impubere majore ſeptennio.* Obſerve his Reaſon, *quia pubes efficaciter obligatur, impubes verò poteſt per pœnitentiam reſilire.*

Furthermore, To ſhew that Deciſions of this Controverſie in favour of my Lord of *Decies* are not wanting, hearken to the words of *Panormitan*, *Cap.* *Obſerve a former deciſion of the Caſe.*

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ex literis de desponſ. impub. Deciditur (ſaith he) quod major non poteſt diſſentire, ſed minor factus major: whence he concludes, that *Major contrahens cum minore tenetur expectare minorem donec perveniat ad ætatem legitimam.*

Although what hath been ſaid is ſufficient to eſtabliſh this Aſſertion upon an authentick Foundation, yet out of the Spring-tyde of Legal Proofs I ſhall at this time, out of a greater number (which for want of time I cannot now inſiſt upon) bring in the concurrence of other Authors, as well Caſuiſts as Canoniſts, without any unneceſſary enlargement, to ſhew further the Conſent of Common Opinion in this behalf;

And firſt I begin with *Dominus Cataneus, vocabulo Sponſalia p.* 416. *qui legitima celebravit ſponſalia; tenetur ſub reatu læthalis criminis procedere ad ſolemnizationem Matrimonii in facie Eccleſiæ.*

Hoſtienſis *de deſp. impub. n.* 11. *Sin autem pubes cum impubere contraxit, tenetur pubes expectare donec impubes veniat ad legitimos annos, ligatur enim adeo pubes quod non poteſt reprobare ſemel probatum, minor tamen veniens ad annos legitimos ſi non conſenſerit poterit reſilire;* (and thereafter) *cum enim ſemel conſenſerit pubes, ſcilicet per verba de præſenti.* The Reaſon is this; *Pubes fortius obligatur quâm impubes, quia maturioris conſilii eſt, plerunque enim ætas impuberis quod videat, ignorat, & ſciens, fallere non videatur.* Wherefore let no Man wonder at the Reaſon why the Lady ſhould be more obliged than the

the Lord of *Decies*, whilſt he hath a power reſerved to himſelf of diſſenting. *Summa Armilla ſub vocabulo, ſponſalia, Impubes cum pervenerit ad ætatem debitam poteſt contradicere, pubes autem nunquam.*

Boych ſaith thus: *Extra, de Deſponſ. & Matr. Cap. perquiſivit*, quoting *Gofridus in ſumma tit. eod. Indiſtinctè pubes diſſentiens cogi debet ad celebrandum*: Whence it follows, that notwithſtanding the pretended ſecond Marriage, the Lady *Decies* is compellable to reſtitution to the Lord *Decies*.

Arnoldus Corvinus *Juris Canonici lib. 2. tit. 12. Contrahere ſponſalia poſſunt omnes tâm puberes, quàm impuberes qui ſeptennium exceſſerunt. C. acceſsit 5. de deſponſ. impub. quia voluntas quæ in naturali conſenſu quieſcit, in eos, qui ſeptem annorum complêrunt ætatem, cadit; L. ſi Infanti 18. §. ult. & L. potuit. 5. C. de Jure de lib. Ante ſi contraxerint poſt ſeptimum annum legitimo conſenſu, C. duo pueri, 12. & ibi Abb. eod. vel cohabitatione. C. literas 4. §. fin. C. acceſsit. 5. verſi conſenſus. C. duo pueri 12. eod. vel nixu ad coitum. C. juvenis 3. hic. C. fraternitati 7. de eo qui cogn. conſ. accedente convaleſcunt.*

Marchantius de Matrim. reſponſ. ad 2. quæſt. Reſpondeo ad ſecundum: Dominam A. B. contrahentem poſt annos pubertatis cum Domino, C. D. impubere ſive ante pubertatem C. D. ſive poſt permanente conſenſu C. D. non poſſe reclamare vel reſilire: Eſt textus planus & apertus. C. de illis de deſp. impub. quod eſt Alexandri tertii ad Bathonienſum Epiſcopum, ubi ſic habetur; Mulier autem quæ poſt-

poſtquam annos nubiles attingit, ei, qui nondum ad annos aptos Matrimonio venerat, nupſit, cum in eum ſemel conſenſerit, amplius non poterit diſſentire, niſi ipſe cui nupſit, poſtquam ad legitimam ætatem pervenerit, in eam ſuum negaverit præſtare conſenſum: ſed in propoſito caſu Domina A. B. *poſtquam annos nubiles attigiſſet, nupſit Domino* C. D. *qui nec dum ad annos aptos Matrimonio provenerat: ergo non poteſt amplius diſſentire ex parte ſua, niſi Dominus* C. D. *ipſe reſiliat: Ratio autem cur puberibus poteſtas reſiliendi non concedatur, ſed ſolum impuberibus eſt, quia pubes cenſetur habere plenam perfectamq; ætatem & prudentiam ad deliberandum, non ſic vero impubes qui cum eo tempore quo ducit, non ſit aptus Matrimonio & Generationi, ejus conſenſus datus ante pubertatem non cenſetur perfectus, niſi vel ratificetur poſt pubertatem adeptam, vel ſaltem perſeverare cenſetur; Quam rationem ex impubere Judicat.* C. *de illis, ſupra citatum. Corporis ſui ad generationem, cenſetur quidem modo illam dare, ita tamen ut plena poſſeſſio tantum pro tempore quo erat aptus generationi accipiatur.*

Henricus Boych *in tertio Caſu, ſcilicet, Quando alter contrahentium Spónſalia eſt pubes & alter impubes refert. Aut quæris utrum ille qui erat pubes tempore ſponſaliorum poſsit reclamare: & dic quod non, ut hic, in §. Mulier autem, aut ille qui erat impubes: Nunc verò factus pubes: & dic, quod ſic: dummodo in eo tempore quo pubeſcit vel incontinenti poſt reclamaverit: ut in Paragrapho allegant, ſi vero, unde quando pubes cum impubere contrahit, ſtatim tenent Sponſalia quoad utrumque, & uterque expectare tenetur*

tur quo uſque impubes ad pubertatem perveniat, & tunc ſi reclamat, ſolvuntur ſponſalia, ſi non reclamaverit, ab Eccleſia contrahere compelluntur.

It may now appear out of the aforegoing diſcourſe to the full ſatisfaction of all perſons, whoſe Intereſt will give them leave to comply with Reaſon and Authority, the greateſt Patron of Belief, that the particulars of the ſubſequent Recapitulation of the Premiſes are moſt true: *Viz.*

1. That the Lord of *Decies* (as repreſented in the foregoing Caſe) is ſo far obliged by the Marriage had and ſolemnized *in facie Eccleſiæ* by the Archbiſhop of *Canterbury*, that he cannot make Reclamation thereof before he ſhall attain to the age of Fourteen years.

2. That the Lady being above Twelve years of age at the time of the Marriage ſo ſolemnized, as aforeſaid, could not either in Law or Conſcience, neither can ſhe hereafter reclaim, or depart from the ſaid Marriage, until Reclamation be made by the ſaid Lord of *Decies* at his age of Fourteen years: wherefore there is no Reaſon ſhe, being of Age at the time of the Contract, ſhould be at her own diſpoſal, whilſt he is bound not to diſpoſe of himſelf.

3. That the Lady *Decies* in Conſcience is bound, and by Law may be compelled to cohabit with the ſaid Lord of *Decies*, if he ſhall think fit to aſſociate himſelf at his age of Fourteen.

4. That ſhe ought to have been ſequeſtred, and ſtill ſhould be ſequeſtred *pendente lite*, which undoubtedly the Judges will do upon due requiſition.

5. That no Marriage againſt the particular Inhibition of the Church ought to be priviledged, or to prejudice a former Marriage lawfully ſolemnized.

6. That the Conſequence of allowing the Lady *Decies* to continue in Cohabitation with Mr. *Villiers* would be extreamly injurious to my Lord of *Decies*, and a pernicious example and effect to the Publick.

For which Reaſons it is hoped, that no Man, who was not a Counſeller in the Deſign of the ſecond Marriage, will approve of it in the *poſt* fact, or will think that it is to be countenanced under the umbrage of a *fieri non debet*, *ſed factum valet*: for that ſentence of Law, though in ſome Caſes it might make good that which was otherwiſe unlawful, yet it doth not hold to the prejudice of a third perſon; nor can it make that void, which in it ſelf is indiſſoluble and cannot conſiſt therewith, unleſs *priority* of Contract ſhould yeild to *poſteriority*; or the Law 1. *Eliz.* concerning Marriages were Repealed.

Dated the 30th of
Octob. 1676.

Dud. Loftus.